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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ARNOLD J. HELLMICH, United States Collector of Internal Revenue, Petitioner, vs. MISSOURI PACIFIC RAILROAD COMPANY, Respondent.	No. 507.

SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

STATEMENT.

The Solicitor General, on behalf of Arnold J. Hellmich, United States Collector of Internal Revenue, has filed a petition praying that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the case of **Missouri Pacific Railroad Company v. Arnold J. Hellmich**, No. 7129, rendered April 28, 1926 (Rec., p. 56).

The judgment entered by the Court of Appeals reversed a finding and judgment for Hellmich, as Collector, entered by the United States District Court for the Eastern Division of Missouri and directed that judgment should be entered for the Railroad Company on account of its claim for taxes exacted by the Commissioner of Internal Revenue on telegraphic messages transmitted under a contract between the Western Union Telegraph Company and the Railroad Company. The contract was entered in the year 1911, long prior to the enactment of the Revenue Act of 1918.

Under the contract between the Western Union Telegraph Company and the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, in consideration of certain services to be rendered by the Railway Companies to the Western Union and other considerations mentioned in the contract, the Telegraph Company agreed to transmit over its lines, without payment or other charge than that afforded by the service rendered to the Telegraph Company by the Railway Companies and the other considerations set forth in the contract, telegrams annually up to a limit of $75,000.00. The provisions of the contract pertinent are the following:

> "Fourth. The Telegraph Company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroads covered by this agreement, as the Railway Companies may desire, for messages pertaining to their railroad business, to be authorized by franks

permitting all classes of messages and telegraphic letters in public use on the lines of the Telegraph Company, to be issued to such officers and agents of the Railway Companies as may be designated by their presidents or general managers; and the Railway Companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the Telegraph Company may require for its employes, supplies and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews and equipment for distribution service, and outfit boarding and tool cars for work on the lines along said railroads, whenever required by the Telegraph Company. The transportation of employes to be authorized by passes to be issued by the Railway Companies on request of the superintendent or other authorized officer of the Telegraph Company.

"Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of service rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during such year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000

in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, provided, that in the event that each of the parties hereto is rendered bills for such services in excess of $75,000 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000, there shall be no payment by either party to the other therefor."

It is the contention of the Railroad Company that telegraphic messages transmitted under the provisions of the contract were not taxable under the provisions of Sections 500 (f), 501 (a) of the Revenue Act of 1918, and Sections 500 (a) and 501 of the Revenue Act of 1921.

The District Court rendered judgment for the Collector and, upon writ of error to the Circuit Court of Appeals, the judgment was reversed, that court holding that only telegraphic messages in excess of the contract allowance of $75,000 were subject to tax.

The Missouri Pacific Railroad Company had succeeded to all of the contract rights and privileges of the companies named in the contract and was rendering the services in performing the contract on its part, as the successor of the former companies.

It is the contention of the attorneys for petitioner that, because the decision of the Circuit Court of Appeals is in conflict with two decisions of two district courts of the United States, certiorari should be granted.

BRIEF.

I.

A conflict of decisions between district courts and a circuit court of appeals does not authorize the issuance of a writ of certiorari by this court.

United States Supreme Court Rule 35, Paragraph 5;
Sec. 240 (a) United States at Large, Vol. 43, p. 938;
Forsyth v. Hammond, 166 U. S., l. c. 514;
American Construction Co. v. Jacksonville R. R. Co., 148 U. S. 372.

II.

The amount of telegrams sent each year, up to $75,000, is exempt from taxation, because there was no charge for such service within the meaning of Sections 500, 501 (a), 502, Revenue Act, 1918; Sections 500, 501, 502 (a), Revenue Act, 1921.

III.

There is no "charge" for services when the creditor has no right to demand payment in money.

L. & N. Ry. Co. v. Motley, 219 U. S. 467;
C. I. & L. Ry. Co. v. U. S., 219 U. S. 486;
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T. & P. Ry. Co. v. Mugg, 202 U. S. 242.

IV.

An exchange of service between a telegraph company and a railroad company may be arranged upon the basis of reciprocal advantage, without regard to the rates charged for similar service to the public.

Postal Telegraph Co. v. Railroad Co., 248 U. S. 471.

V.

It is an accepted rule of interpretation as to taxing statutes, that they should be construed in favor of the taxpayer and against the Government.

Gould v. Gould, 245 U. S. 153;
Benziger v. U. S., 192 U. S. 38.

ARGUMENT.

It is respectfully submitted by the Missouri Pacific Railroad Company, respondent herein, that the reasons urged in the petition for the issuance of a writ of certiorari do not justify the issuance of such writ by this Court. It is stated in the petition that, under circumstances somewhat similar to the facts disclosed by the record in this case, the United States District Court of New York, in the case of **Western Union v. Lackawanna Railroad Co., 282 Fed. 925**, and Judge Hand of the District Court of the Southern District of New York, in the case of **Delaware, Lackawanna & Western Railroad Co. v. Bowers, Collector of Internal Revenue for the Second District of New York** (decided January 22, 1926), have rendered decisions not in harmony with the decision of the United States Circuit Court of Appeals for the Eighth Circuit in this cause. It does not appear that any review was sought in the District Court decisions referred to.

The issuance of a writ of certiorari is not a matter of absolute right and this Court in Rule 35 of the Revised Rules adopted June 8, 1925, says:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

"(b) **Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter;** or has decided an important question of local law in a way probably in conflict with applicable local decisions.

"Or has decided an important question in a way probably untenable or in conflict with the weight of authorities.

"Or has decided an important question of federal law which has not been, but should be, settled by this Court," etc.

There is present, therefore, no conflict between the decision of the United States Circuit Court of Appeals and any other Court of Appeals, and it is only by the exercise of discretion that the writ can issue.

In

Forsyth v. Hammond, 166 U. S., l. c. 514,

this Court said:

"We reaffirm in this case the propositions heretofore announced, to wit, that the power of this Court in certiorari extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the

circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between **two or more courts of appeal, or between courts of appeal** and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

II.

The portions of Sec. 500 of the Revenue Act of 1918 particularly applicable to telegraph companies are subdivisions (f), (g) and (h), which fix the rate of tax to be paid on telegrams.

Subdivision (a) of section 501 provides

> "that the taxes imposed by section 500 shall be paid by the **person** paying for the services or facilities rendered."

Subdivision (c) of section 501 provides:

> "The taxes imposed by section 500 shall apply to all services or facilities specified in such section, **when rendered for hire**, whether or not the agency rendering them is a common carrier."

Section 502 of the act provides:

> "That each person **receiving any payments** referred to in section 500 shall collect the amount of the tax, if any, imposed by such section, from the person **making** such payments and shall make monthly returns under oath, in duplicate, and pay the taxes so collected, and

> the taxes imposed upon it under subdivision (c) or (d) of section 501, to the Collector of the District in which the principal office or place of business is located."

When Congress passed the Revenue Act, providing for a tax upon messages to be paid by the person paying for the services, and excepted services rendered

> "upon transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier," etc.,

and

> "any commodity which is necessary for the use of the carrier in the conduct of its business, as such,"

it had before it the Interstate Commerce Act which had been passed in 1908 and amended in the year 1917, making telegraph companies common carriers to all intents and purposes by the use of the following language:

> "The term 'common carrier,' as used in this act, shall include * * * telegraph, telephone and cable companies operating by wire or wireless."
>
> Subparagraph 3, Section I, Interstate Com. Act.

And Congress also had before it the exception contained in subparagraph 5, Section I of the Interstate Commerce Act, as follows:

> "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from

entering into contracts with common carriers **for the exchange of services.**"

The Circuit Court of Appeals, in its decision in this case, cited the recent decision of the United States Supreme Court in the case of

George Iselin v. United States (decided March 1, 1926),

to the effect that departmental construction cannot be given the force and effect of law, and then said:

> "The real question is, did these messages upon which the tax was based come within the intendment of subdivision (f) of Section 500 of the Act of 1918? If we adhere strictly to the technical meaning of the language used, we might answer in the affirmative, but this law, as all others, must be construed in the light of the true intent, object and purpose of the legislation. It was not intended thereby to tax any service of this kind which was not rendered for hire; that is to say, for a return either in money or property. In other words, the term 'charge' as used in the act is not a mere bookkeeping term. It means a return in tangible value, measured in money, according to the nature, length and destination of the message. It is so used in regulation 49. When we say 'we make no charge' we mean 'we exact no payment.'
>
> "This contract contemplated no payment at all for mutual services up to $75,000. The payments contemplated were upon the excess, or balance of excess, above $75,000. The charge on the books, in terms of

dollars and cents, as applied to individual messages (and, of course, corresponding charges were made on the books of the railroad company for transportation furnished) was simply to keep a record for the purpose of ascertaining whether any chargeable excess should come into existence against either party to the contract. This appears from the annual settlements made. For the year ending August 31, 1920, the net transportation charges of the railroad against the telegraph company were $80,721.72. The total telegraphic charges for services furnished by the Western Union Company were $71,815.17. The excess of transportation charges over the free carriage allowed up to $75,000 was $5,721.72, but the excess of railroad service over telegraph service was $8,906.55. If the whole volume of service was subject to payment, settlement being made on general balances, the railroad should have demanded and received $8,906.55, but, instead, in accordance with the terms of the contract, it received but $5,721.72. In other words, on each side service up to $75,000 was free, to be used or not used as desired. There was no purpose to charge for it. The fact that where mutual services were actually rendered in excess of $75,000 an appearance of payment, dollar for dollar, is presented, furnishes no controlling guide to ascertainment of the nature of the transaction. The consideration in this contract was not the reciprocal services themselves, on an established tariff basis, but the privilege or option to receive $75,000 worth of free service, should either or both so elect. If each party was, in effect, to charge at the tariff rates for all services without franking privileges, no contract would have been necessary."

The situation is somewhat similar to that reviewed by this Court in the case of

Postal Telegraph Co. v. Tonopah R. R. Co., 248 U. S., l. c. 475,

where the Court said:

> "The railroad and the telegraph have grown together in mutual dependence and we are told that contracts of this sort for long terms have been nearly universal for fifty years. The contracts had been called to the attention of Congress repeatedly by the Commission, which, in December, 1906, stated that, so far as it could see, the full performance of them by the carriers would not affect any public or private interest adversely.
>
> "It held, however, that under the law as it then stood contracts for services off the line were unlawful (12 I. C. C. 10, 12). Then the amendment of 1910 was passed, and passed, we must suppose, having the opinion of the Commission and the notorious long-standing form of existing contracts in view. The contracts are complex, as we have said, and entire. We cannot believe that an act which purported to allow them meant to break them up. The Commission seems not to have believed it in its first ruling upon the amended act."

III.

We respectfully submit that the decision of the Court of Appeals for the Eighth Circuit correctly interpreted the provisions of the contract which was the subject of review, and, if the decision of that court is correct, there is

no occasion for reviewing it here because a district court, or courts, may have heretofore held otherwise. The decision of the Court of Appeals is in harmony with the general rule of interpretation as to taxing statutes announced by this Court in the case of

Gould v. Gould, 245 U. S. 153,

where the Court said:

> "In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the Government and in favor of the citizen."

For the reasons stated, the petition for certiorari should be denied.

MERRITT U. HAYDEN,
EDW. J. WHITE and
JAMES F. GREEN,
Attorneys for Missouri Pacific Railroad Company.

FILED

JAN 11 1926

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

ARNOLD J. HELLMICH, United States Collector of Internal Revenue, Petitioner,

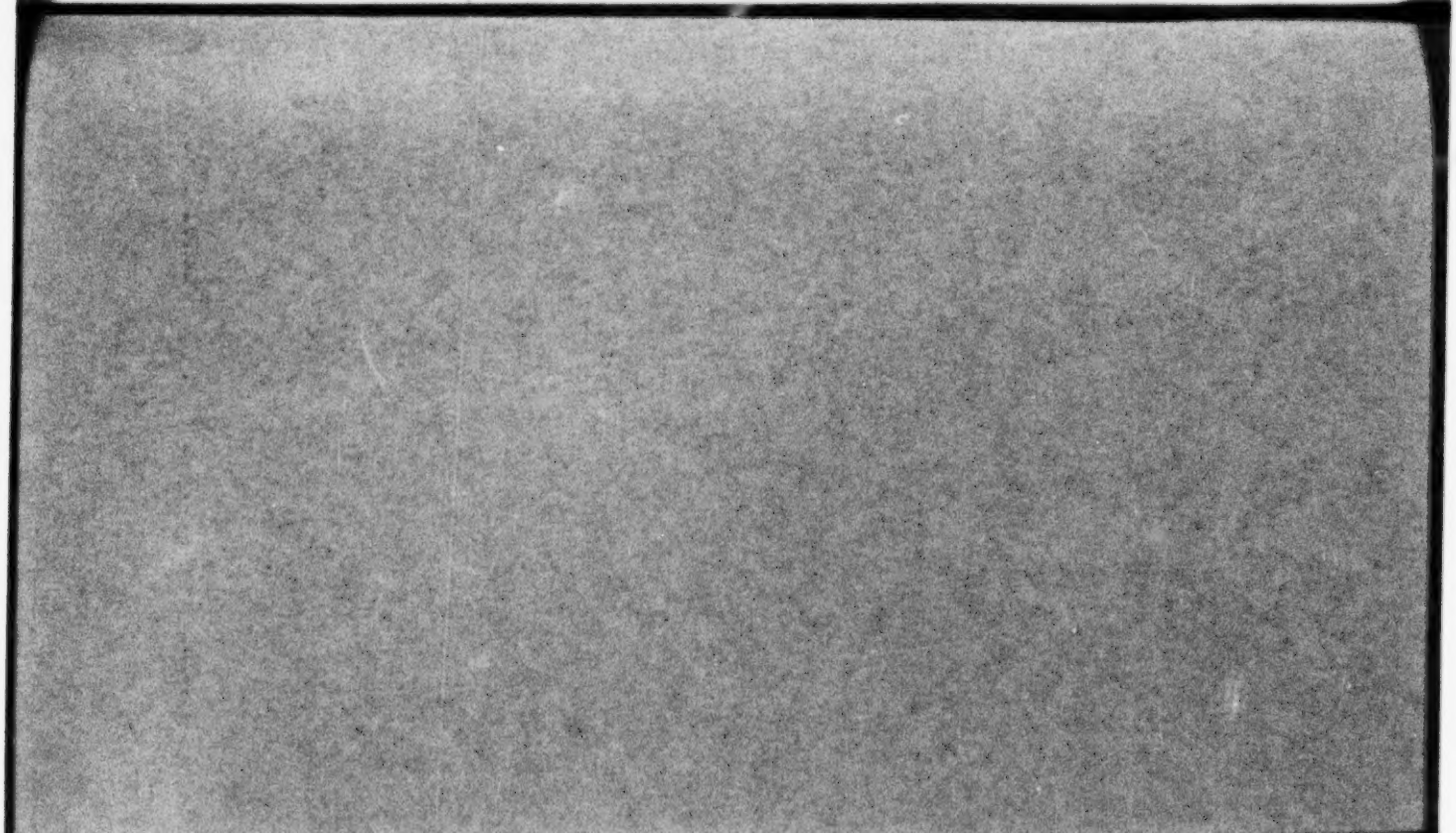
vs.

MISSOURI PACIFIC RAILROAD COMPANY.

No. 567.

STATEMENT, BRIEF AND ARGUMENT FOR MISSOURI PACIFIC RAILROAD COMPANY.

JAMES F. GREEN and EDW. J. WINNE, Counsel for Missouri Pacific Railroad Company.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ARNOLD J. HELLMICH, United States Collector of Internal Revenue, Petitioner, vs. MISSOURI PACIFIC RAILROAD COMPANY.	No. 507.

STATEMENT, BRIEF AND ARGUMENT FOR MISSOURI PACIFIC RAILROAD COMPANY.

STATEMENT.

The Government obtained a writ of certiorari to review the action of the United States Circuit Court of Appeals for the Eighth Judicial Circuit reversing the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, in the suit of Missouri Pacific Railroad Company to recover income taxes paid amounting to

$14,792.95 on Western Union telegraph messages during the period of March, 1920, to January 23, 1923, inclusive.

All said messages were attempted to be taxed by the Government under Article IX of Regulation 57 of the Commissioner of Internal Revenue, and the taxes were paid under protest and then action instituted to recover same.

There was no dispute upon the facts that all of said messages were transmitted under the standard form of the Western Union contract, under the terms of which the Railroad Company and the Telegraph Company exchanged services as common carriers up to the maximum amount specified in said standard form of contract.

There was also no dispute upon the fact that under the Interstate Commerce Act of 1908, as amended in the year 1917, telegraph companies were made common carriers to all intents and purposes by the use of the following language:

> "The term 'common carrier,' as used in this act, shall include * * * telegraph, telephone and cable companies operating wire or wireless."
>
> Subparagraph 3, Section 1, Interstate Commerce Act.

Nor was there any dispute upon the proposition that by subparagraph 5, Section 1 of the Interstate Commerce Act it was clearly provided:

"That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services,"

and the following portion of subparagraph 7, Section 1 of the Interstate Commerce Act:

"Provided that this provision shall not be construed to prohibit the interchange of passes for the officers, agents and employes of common carriers and their families; * * * and provided, further, that this provision shall not be construed to prohibit the privilege of passes or franks or the exchange thereof with each other for the officers, agents, employes and their families of such telegraph, telephone and cable lines, and the officers, agents, employes and their families of other common carriers subject to the provisions of this act."

In view of these provisions of the Act to Regulate Commerce authorizing the exchange of services, and the fact that Paragraph G of Section 500 of the Revenue Act of 1918, subparagraph 2, excepted the tax to be paid upon messages transmitted "in the conduct by a common carrier or telegraph or telephone company of its business as such," and that by Paragraph (c) of Section 501 of the said Revenue Act of 1918, expressly providing that:

"Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transporta-

> tion of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used, or has been used; or (2) upon the transportation of company material transported by one carrier, which constituted a part of a railroad system, for another carrier which is also a part of the same system."

the Court of Appeals held that such services were not taxable.

It was contended in the District Court that the attempt of the Commissioner of Internal Revenue by Regulation No. 57 to tax Western Union frank messages sent under the said contract,

> "whether such messages relate to the operation of the business of the common carrier and whether they are on line or off line * * * and whether free or at half rates, or subject to the tax provided by this section,"

was, in effect, a void and unwarranted order, inconsistent with the clear intent of Congress.

And in view of regulation No. 49 of the Commissioner of Internal Revenue, under Section 501 of the Revenue Act of 1918, providing as follows, that when

> "the railroad company, under contract, transports commodities necessary to maintain or operate such telegraph or telephone line or lines * * * and the railroad company makes no charge for such transportation the charges which, but for such arrange-

ment, would have accrued on such transportation **are exempt from the tax,"**

that the Government had admitted that the Act to Regulate Commerce and the Revenue Act were in pari materia, and, having exempted the services rendered by the railroad company, authorized under the Act to Regulate Commerce to be exchanged for the services rendered by the telegraph company, that the service rendered by the telegraph company, the other party to the contract, **was likewise exempt from taxation.** The opinion of the United States Circuit Court of Appeals for the Eighth Judicial Circuit in this case was as follows:

"Before Stone, Van Valkenburgh and Booth, Circuit Judges. Van Valkenburgh, Circuit Judge, delivered the opinion of the Court.

"The Revenue Act of 1918, among other things, provided:

"'Sec. 500. That from and after April 1, 1919, there shall be levied, assessed, collected and paid in lieu of the taxes imposed by Section 500 of the Revenue Act of 1917:

* * * * * * *

"'(f) In the case of each telegraph, telephone, cable or radio dispatch, message or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and, if the charge is more than 50 cents, a tax of 10 cents; **PROVIDED**, that

only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message or conversation.

"'Sec. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * * * *

"'(c) The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. * * * Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (2) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system.

* * * * * * *

"'The returns required under this section shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.'

"The Commissioner of Internal Revenue prescribed the following regulations deemed pertinent to this inquiry. Article IX of Regulations, numbered 57:

"'Messages Transmitted Under Contract.—Where by contract a telegraph, telephone, radio or cable company agrees, in consideration of the payment of a

lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500-f of the act). The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of the common carrier and whether they are "on-line" or "off-line" are immaterial. Thus a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business "free" and all such messages over its lines off the railroad line "free" to an amount not exceeding ten thousand dollars ($10,000.00) per year calculated at regular rates, and all messages over that amount at half rates in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether "on-line" or "off-line" and whether "free" or at half-rates, are subject to the tax provided by this section (500-f) of the act. The tax must be computed, collected and paid upon each such message.'

"Regulation No. 49, issued by the Internal Revenue Department in 1920:

"'If a telegraph or telephone line or lines along the line of any railroad company be necessary for the use of such railroad company in the conduct of the railroad company's business as such, and if the railroad company, under contract, transports commodities necessary to maintain or operate such telegraph

or telephone line or lines along the line of such railroad company, such commodities being intended to be, or having been so used, and the railroad company makes no charge for such trassportation, the charges which, but for such arrangement, would have accrued upon such transportation, are exempt from the tax.'

"On the 24th day of October, 1911, the Western Union Telegraph Company and the predecessors of plaintiff in error, all common carriers engaged in interstate commerce, and subject to the Act of Congress to Regulate Interstate Commerce, entered into a written contract, the material parts of which are as follows:

" 'The Telegraph Company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroad covered by this agreement, as the Railway Companies may desire, for messages pertaining to their railroad business, to be authorized by frank permitting all classes of messages and telegraphic letters in public use on the lines of the Telegraph Company, to be issued to such officers and agents of the Railway Companies as may be designated by their presidents or general managers; and the Railway Companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the Telegraph Company may require for its employes, supplies and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews and equipment for distribution service, and outfit, boarding and tool cars for work on

the lines along said railroads, whenever required by the Telegraph Company. The transportation of employes to be authorized by passes to be issued by the Railway Companies on request of the superintendent or other authorized officer of the Telegraph Company.

"'Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of service rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during the year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000 in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, *provided*, that, in the event that each of the parties hereto is rendered bills for such service in excess of $75,000 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000, there shall be no payment by either party to the other therefor.'

"This contract was in full force and effect between plaintiff in error and the telegraph company at the

time of the enactment of the Revenue Act of 1918, to which reference has been made.

"The Interstate Commerce Act, which forbids any common carrier subject to its provisions, directly or indirectly, by any special rate, rebate, drawback or other device, to charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered than it charges, demands, collects or receives from any other person or persons, for a like service, provides further that 'nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services' (Sec. 8569, Compiled Statutes of the United States 1916).

"The arrangement made by the contract of October 24, 1911, although an apparent departure from the provisions of the original act against granting special rates or charges, was thus recognized by Congress and approved by the Supreme Court for the reason that the interdependence of such companies is very intimate. The railroads and the telegraph companies have grown together in mutual dependence; each is necessary to the other. The bargain between them is a very complex one, and all the benefits derived on one side, including those of a pecuniary nature, form the consideration for all the benefits conferred upon the other.

Postal Telegraph Cable Co. v. Tonopah R. R., 248 U. S. 471.

"Defendant in error made demand upon plaintiff in error in May and June, 1923, for taxes claimed to be

due on account of franked Western Union messages transmitted during the period from March, 1920, to January, 1923, inclusive, aggregating $14,792.95. These taxes covered all messages sent, including the free service provided by the contract. Plaintiff in error paid these sums under protest, the sufficiency of which is conceded, and, thereafter, in March, 1924, brought suit for the recovery thereof. It is agreed that plaintiff in error duly appealed to the Commissioner of Internal Revenue for refund, and that the Commissioner failed to render any decision or make any response to such appeal for more than six months after the same was presented to him. It is further agreed that if the Court should find for the railroad company, judgment should be rendered in its favor for the sums claimed, to wit, $14,792.95. Upon submission to the Court, on stipulation of parties waiving a trial by jury, a judgment was rendered in favor of defendant in error.

"Plaintiff in error urges that the Revenue Act of 1918 and the Interstate Commerce Act, above quoted, are in pari materia, and that the latter should be considered as governing the application of the former. To this we cannot agree, because the two acts do not deal with the same subject matter. The parties are the same, but the subject matter in the one case is taxation; in the other, the regulation and control of carriers. The latter act differentiates carriers from ordinary shippers permitting contracts for exchange service. The language of this Court in **United States v. Railroad, 157 Fed. 321**, is conclusive upon this question. Nevertheless, the Commerce Act is instructive and pertinent as revealing the attitude of the Government toward contracts of this nature.

"We also agree with the trial court that Regulation No. 57 has no force as creating a tax. The regulation is powerless to enlarge the act. We may also concede the general rule that long interpretation of a statute by an executive department charged with its enforcement is entitled to weight, and that under some circumstances a subsequent enactment without change has been held to indicate approval of prior administrative construction and interpretation; but this rule would apply equally to Regulation No. 49, whereby the telegraph company is, by interpretation, exempted from tax where the railroad company, under contract, transports commodities necessary to maintain or operate such telegraph lines along the line of the railroad company, on the ground that the railroad company makes no charge for such transportation. In this respect, in our opinion, the interpretations disclosed by these two regulations are inconsistent. In this view, it is improbable that Congress had this feature in mind at all when it passed the later Act of 1921, for certainly it cannot be said that the railroad did not charge for the transportation in the same sense as the telegraph company did for the messages. The situation presented is similar to that before the Supreme Court in **George Iselin v. United States**, decided March 1, 1926, 271 U. S. 136, in which it was held that such departmental construction cannot be given the force and effect of law.

"The real question is, did these messages upon which the tax was based come within the intendment of subdivision (f) of Section 500 of the Act of 1918? If we adhere strictly to the technical meaning of the language used, we might answer in the affirmative; but

this law, as all others, must be construed in the light of the true intent, object and purpose of the legislation. It was not intended thereby to tax any service of this kind which was not rendered for hire; that is to say, for a return either in money or property. In other words, the term charge as used in the act is not a mere bookkeeping term. It means a return in tangible value, measured in money, according to the nature, length and destination of the message. It is so used in Regulation 49. When we say, 'We make no charge,' we mean, 'We exact no payment.'

"This contract contemplated no payment at all for mutual services up to $75,000. The payments contemplated were upon the excess or balance of excess, above $75,000. The charge on the books, in terms of dollars and cents, as applied to individual messages (and, of course, corresponding charges were made on the books of the Railroad Company for transportation furnished), was simply to keep a record for the purpose of ascertaining whether any chargeable excess should come into existence against either party to the contract. This appears from the annual settlements made. For the year ending August 31, 1920, the net transportation charges of the Railroad against the Telegraph Company were $80,721.72. The total telegraphic charges for services furnished by the Western Union Company were $71,815.17. The excess of transportation charges over the free carriage allowed up to $75,000 was $5,721.72; but the excess of railroad service over telegraph service was $8,906.55. If the whole volume of service was subject to payment, settlement being made on general balances, the Railroad should have demanded and received $8,906.55, but, in

stead, in accordance with the terms of the contract, it received but $5,721.72. In other words, on each side, service up to $75,000 was free to be used or not as desired. There was no purpose to charge for it. The fact that where mutual services were actually rendered in excess of $75,000 an appearance of payment, dollar for dollar, is presented, furnishes no controlling guide to ascertainment of the nature of the transaction. The consideration in this contract was not the reciprocal services, themselves, on an established tariff basis, but the privilege or option to receive $75,000 worth of free service, should either or both so elect. If each party was, in effect, to charge at the tariff rates for all services without franking privileges, no contract would have been necessary.

"This contract was made in 1911 before either the war or this war tax was thought of. It is in no sense self-serving nor designed to defeat the revenue. As said in **Postal Telegraph-Cable Company v. Tonopah R. R. Company**, supra, contracts of this nature have been nearly universal for fifty years. The apprehension that they can be employed at will to accomplish immunity from taxation is groundless. When the act was passed, Congress could have expressly provided against such a result if it had been deemed necessary or if such abuse should creep in, it can at any time be met by appropriate legislation. The trial court was admittedly in doubt on the question. It was finally controlled by the view that the contract involved a swapping of services, which, therefore, were for hire; but the contract up to $75,000 was a swapping of privilege rather than of service, and the mutual service up to that limit was free. This is dem-

onstrated by the contemplated operation. If the Railroad had handled no shipments for the Telegraph Company, but had sent messages not exceeding $75,000 in value, it would have paid nothing, although the latter would have rendered $75,000 worth of service and would have charged that amount on its books. The Government seeks to convert a mere bookkeeping fiction into an item of income; but this is not permissible. The transaction must be viewed in its substantial and not in its purely technical aspect. Messages up to the amount of $75,000 did not constitute services for hire, and are, therefore, exempt; those in excess of that amount are subject to tax. The case is **reversed and remanded with directions to apply this rule. It is so ordered.**

Filed April 28, 1926."

BRIEF.

I.

The amount of telegrams sent each year under the terms of the contract up to $75,000.00 was exempt from taxation, because there was no "charge" for such service within the meaning of the act, it being necessary to the accrual of a tax that there should be a "charge."

(a) The word "charge" in the Revenue Act means the price demanded for the service.

Webster's International Dictionary, defining the word "charge";
Century Dictionary and Cyclopedia, defining the word "charge";
Oxford Dictionary, defining the word "charge";
Detroit etc. v. Interstate Commerce Commission, 74 Fed. 803;
Williams v. Western Union Telegraph Co., 203 Fed. 140.

(b) There is no "charge" for services when the creditor has no right to demand payment in money.

L. & N. Rwy. Co. v. Mottley, 219 U. S. 467;
T. & P. Rwy. Co. v. Mugg, 202 U. S. 242;
C. I. & L. Rwy. Co. v. United States, 219 U. S. 486.

(c) Subdivision (f) of section 500 does not impose a tax where there is no right of the Telegraph Company to demand payment for the telegrams sent.

II.

All the telegrams sent by the Western Union Telegraph Company for the Missouri Pacific Railroad Company upon which the tax was attempted to be collected were exempt from the tax.

Sections 500, 501 (a) and 502 of the Revenue Act of 1918;

Sections 500, 501 and 502 (a) of the Revenue Act of 1921.

III.

Article 46 (c) of Regulations 49, promulgated by the Commissioner of Internal Revenue, admits that on a proper and fair construction of the statute there is no "charge" on any of the service rendered by the Telegraph Company to the Railroad Company up to the amount of $75,000.00, provided for in the contract.

IV.

As to the tariffs, rates and charges established under the Interstate Commerce Act do not apply under an agreement for an exchange of service between common carriers,

the "charge" which is attempted to be taxed under section 500 does not exist (Sec. 4563 [3] Compiled Statutes U. S. 1916).

V.

The other numerous subdivisions of Section 500 of the Revenue Act of 1918 imposing a tax upon the amount "paid" are associated with subdivision (f) thereof imposing a tax upon the amount of the "charge," and this association of subdivisions required that that meaning of the word "charge" be accepted which is closest to the meaning of the word "paid."

Gould v. Gould, 245 U. S. 153;
United States v. Field, 255 U. S. 257;
Smietenka v. First Trust & Savings Bank, 257 U. S. 602;
United States v. Salen, 235 U. S. 237;
United States v. Weitzel, 246 U. S. 533.

VI.

This Court having held under the Act to Regulate Commerce that the Interstate Commerce Commission could not prevent the exchange of services between telegraph and railroad companies, whether on or off the line of the railroad company, the Commissioner of Internal Revenue could not prevent such free exchange of service, nor provide that the Railroad Company should pay the Western

Union therefor, or should pay the Government a tax as though such service was subject to a legal charge or payment.

VII.

In attempting to tax services which the Railroad Company was authorized to exchange with the Telegraph Company and to assess such tax upon "all such messages whether 'on line or off line' and whether 'free or deadhead rates,' " the Commissioner of Internal Revenue was, in effect, repealing the provisions of the Act to Regulate Commerce authorizing such free exchange of services and the decision of this Court that such free exchange of services whether on or off the line of the Railroad Company, were proper.

Postal Telegraph & Cable Co. v. Tonapah & Tidewater R. R. Co., 248 U. S. 471.

ARGUMENT.

I.

The contract governing the full exchange of services by these common carriers provides:

> **"There shall be no payment by either party to the other party therefor,"**

referring to the exchange of service, up to seventy-five thousand dollars ($75,000.00).

This contract, therefore, on its face provided that there should be no "payment" for the telegraph service exchanged for the transportation rendered by the railroad company, and in the face of the fact that Section 501 of the Revenue Act of 1918 provides that the taxes claimed by the Government

> "shall be paid by the person **paying for the service**,"

and that section 500 provides for a

> "tax equivalent to ten per centum (10%) of the amount **paid** after such date to any telegraph or telephone company * * * shall not apply to the amount **paid** * * * in the conduct by a common carrier or telephone or telegraph company of its business as such."

and that these revenue acts thus clearly evidence an intention that taxes shall be paid on Western Union messages only where the message has been **"paid"** for

> "by the person **paying** for the service,"

and that even where the messages are paid for that no tax is to be collected for service rendered

> "in the conduct, by a common carrier or telephone or telegraph company, of its business as such,"

the Commissioner of Internal Revenue undertook by Regulation No. 57 to include all classes of messages mentioned in the contract of the plaintiff with the Western Union Telegraph Company, which provided that

> "there shall be no payment by either party to the other therefor,"

and thus to tax messages of common carriers which are clearly excepted in the statute, although no payment had been made therefor, by holding that these messages were paid for. Both the contract and the undisputed evidence shows they were not paid for, but were authorized by the Interstate Commerce Act and by the Revenue Act to be exempted from the tax attempted to be imposed by this regulation.

The Collector in his brief quotes numerous definitions of the word "charge" to show that the services of the

Western Union Company were charged to the Railroad Company, but the word with which the Revenue Act concerns itself is the word "paid."

The contract under which the services were rendered in this case provides that no payment shall be made for services within the seventy-five-thousand-dollar ($75,000) limit, and the statute only imposes a tax for services for which payment was made.

Of course, the word "charge," as used in the books in the illustrations mentioned in the brief of the collector, as where the freight charges of a carrier imply the obligation to settle for the charge, is in accordance with the common-law rule which creates a corresponding obligation to pay for services which can be recovered for under a quantum meruit, but this is wholly beside the question rendered upon payments made for services where no payment at all was made and where the law excepted the class of service rendered to the party against whom the tax is imposed from the payment of the tax. The argument that the exchange of services "was a payment in kind" overlooks the spirit and intent of the Interstate Commerce Act, which includes

"the transmission of intelligence by wire"

as necessary services of a common carrier; telegraph companies are defined as included within the term "common carrier" and the Government expressly authorizes, in the

Interstate Commerce Act, the exchange of services between telegraph companies and railroad companies (subsections (1), (3), (5) and (7), Section I, Interstate Commerce Act of June 29, 1906, as amended May 29, 1917, and August 10, 1917), the Interstate Commerce Act containing the following provision:

> "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services" (Subsection 5, Section I, Interstate Commerce Act).

This Court, in Postal Telegraph Co. v. Tonopah R. Co. (248 United States, p. 472), upholds this provision of the act, and the Revenue Act was passed after this decision and after the enactment of the Interstate Commerce Act, which authorized the exchange of services and legalized the contract of the plaintiff and the Western Union Telegraph Company in this case, in which no payment was made for the services rendered up to the seventy-five-thousand-dollar ($75,000.00) limit. The argument of the collector that it is not necessary for the consideration to be a monetary one, of course, has no application to a taxing statute where a tax is only imposed where the consideration paid was a monetary one. The Government, by the Interstate Commerce Act, authorizes the exchange of services without payment; the Revenue Act excepts services rendered by common carriers under this act from the

tax. The regulation of the Commissioner attempts to impose the tax on this service thus excepted and hence the regulation of the Commissioner of Internal Revenue cannot have the force and effect of law, because contrary to the taxing statute.

In view of this fact, the argument of the Collector that Regulation No. 57 was reasonably adapted to the enforcement of Subdivision (f) Section 500 of the Revenue Act, "and, therefore, has the force and effect of law," cannot be true, since it imposes a tax where none was imposed by the statute, and unless the courts are to hold that the power to impose the tax resides in the Commissioner of Internal Revenue and not in the representatives of the people, his Regulation No. 57 cannot have "the force and effect of law."

The case of Western Union Telegraph Co. v. Delaware and Lackawanna Company (282 Fed. 925) can have no application here, because there the parties attempted to make a case to uphold the regulation of the Commissioner of Internal Revenue and not to have the question fairly determined by the Court. The Collector was not a party to the suit, and hence was not bound by the Court's decision, and the remarks of the Court as to the validity of the regulation of the Commissioner of Internal Revenue, in the absence of evidence, was purely obiter. Evidence was adduced in this case of the unreasonableness of the regulation and of the custom and manner of handling the services sought to be taxed; hence the Collector, under

the agreed statement, was not entitled to the tax and the railroad's right of recovery, under the agreed statement and the provisions of the Revenue Act and the attempted Regulation No. 57, should be apparent.

II.

The Amount of the Telegrams Sent Each Year Up to $75,000 Is Exempt From Taxation, Because There Was No "Charge" for Such Service Within the Meaning of the Act, It Being Necessary to the Accrual of the Tax That There Be a "Charge."

(a) **Statutes on the same subject must be read in connection with the Revenue Acts.** The taxes imposed by Section 500 of the Revenue Act of 1918 were assessed upon the same subjects which are controlled and regulated by the Interstate Commerce Act. Section 8563, paragraph 1, Compiled Statutes United States 1916 (Interstate Commerce Act), provides as follows:

> "The provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from

one state, territory or district of the United States to any other state, territory or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment) from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry, either in the United States or any adjacent foreign country. Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid."

Section 500 of the Revenue Act of 1918 and the Interstate Commerce Act are in pari materia and under well-established principles of law, words common to both acts are to be construed and given like meaning. The rule is stated in 36 Cyc, page 1147, as follows:

> "Statutes in pari materia are those which relate to the same person or thing or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it as together constituting one law. * * * **Whenever a Legislature has used a word in a statute in one sense and with one meaning and subsequently uses the same word in legislating on the same subject matter, it would be understood as using it in the same sense unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby.**"

Section 500 (f) imposes "in the case of each telegram, telephone, cable or radio dispatch, message or conversation * * * for the transmission of which the **charge** is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the **charge** is more than 50 cents, a tax of 10 cents."

Section 8563, paragraph 3, Compiled Statutes of the United States 1916 (Interstate Commerce Act), reads as follows:

"All charges made for any service rendered, or to be rendered, in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. Provided, that messages by telegraph, telephone or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages; and provided, further, that nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

Section 8564, Compiled Statutes of the United States 1916 (Interstate Commerce Act), reads as follows:

"If any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substan-

tially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 8569, Compiled Statutes of the United States 1916 (Interstate Commerce Act), reads, in part, as follows:

"(1) Every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line or by water, when a through route and joint rate have been established. * * *

"(3) No change shall be made in the rates, fares and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days notice to the Commission and to the public, published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. * * *

"(7) No carrier, unless otherwise provided by this

act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportotion of passengers or property, except such as are specified in such tariffs: Provided, that wherever the word 'carrier' occurs in this act it shall be held to mean 'common carrier.'" * * *

(b) **The word "charge" in the Revenue Act means the price demanded for the service.** The word "charge" is defined by the dictionaries as follows:

"Webster's International Dictionary.—'n. 10. The price demanded for a thing or service. 11. An entry or account of that which is due from one party to another; that which is debited in a business transaction; as, a **charge** in an account book.'

"Century Dictionary and Cyclopedia.—'n. 8. That which constitutes debt in commercial transactions; the sum payable as the price of anything bought or

any service rendered; an entry; the debit side of an account.'

"Funk & Wagnall's New Standard Dictionary.—'n. 3. The price fixed or demanded for anything, as for a service rendered or merchandise sold; as, the **charge** is reasonable. 4. An entry in bookkeeping, setting down an item or sum to some account; as, a charge of $10 dated October 1.'

"Oxford Dictionary.—'17. To subject or make liable (a person, estate, etc.) to a pecuniary obligation or liability. 18. To charge (a sum or price) (a) To impose as a liability on pecuniary charge; (b) to impose, claim, demand or state as the price or sum due **for** anything; (d) with double object (combining 17 and 18): To charge a person a certain sum (for a service or thing sold). 11. A liability to pay money laid upon a person or estate.'

"Words and Phrases (vol. 1, 2d ser. 636.—'To "charge" is to lay on or impose as a load, tax or burden; to fix or demand a price for a thing or service. The word as used in an alternative writ of mandamus, setting up that a railroad charges and has charged rates in excess of the rates prescribed by the Railroad Commissioners, cannot be said to be indefinite and indeterminate in meaning (State ex rel. Atty.-Gen. v. Atlantic Coast Line Ry. Co., 37 South. 652, 656, 48 Fla. 114).'"

While the word "charge" has two meanings, to wit, (a) an entry in an account book, or (b) the price demanded for anything, it is quite apparent that the word is used in the latter sense in both the Interstate Com-

merce Act and Section 500 of the Revenue Act of 1918, and that just as the Interstate Commerce Act means by the word "charge" the price demanded, so the "charge" upon which this tax accrues is the price demanded.

This tax does not accrue unless a price is demanded for the transmission of the telegram. The measure of the tax is the price demanded for the transmission of the telegram—that alone is the "charge." If no price is demanded, there is no charge, and the mere fact that a memorandum is entered in a book of accounts with an amount of dollars opposite such memorandum would not constitute a charge, if this memorandum is controlled by a legal contract that no price is to be demanded.

In Detroit, etc., v. Interstate Commerce Commission, 74 Fed. 803, the word "charges" is defined as the dues demanded in connection with the transportation, etc., described by the act.

In Freight Discrimination Cases, 59 American Rep. 250, the Court defined the term "charge" as follows:

> "The clause, 'to charge for the transportation of any freight,' etc., implies to settle, require or demand of the shipper, as of right, certain compensation for the transportation of any freight already transported, or delivered to the corporation to be transported. As to this, the penalty is incurred when the charge is certainly made against the shipper, in the case provided against by the statute. It cannot be that the compensation charged must first be paid, because it is unlawful 'to charge' otherwise

than is allowed. This does not, in any ordinary sense, imply to receive the compensation, and there is nothing that in terms or by just implication goes to show that any such meaning was intended. The purpose is to give the penalty at once upon making the charge and thus the more certainly to prevent the evil intended to be suppressed, and a violation of the statute."

See, also:

Lehigh Valley Rwy. Co. v. Rainey, 112 Fed. 487; Williams v. Western Union Telegraph Co., 203 Fed. 140.

We take it as plain that the only meaning of a book entry as a charge is to evidence the price which is to be demanded for the service, and that if the book entry does not evidence the price to be demanded for services it does not evidence that there is any charge, the real charge upon which the tax is imposed being the price demanded for the service.

(c) **There is no "charge" for services rendered under an option for an option.** In the present case, no price was to be demanded for telegrams amounting to $75,000. By virtue of the privilege given to the Telegraph Company and the Railroad Company in the statute above quoted, the Railroad Company offered to the Telegraph Company transportation equal at its regular charges to $75,000, and agreed to make no charge for such service, and the Telegraph Company offered to the Railroad Com-

pany telegraphic services equal at its regular charges to $75,000, and agreed to make no charge for such service. The entries in the books were mere memoranda to record when either party reached this maximum of free service.

The service rendered by the Railroad Company was not payment to the Telegraph Company for the service which it rendered. It was not the consideration given by the Railroad Company to the Telegraph Company for the transmission of telegrams. If a mutual consideration be found, it is in the agreement of the parties each to the other to render service up to a certain amount and not in the actual rendition of services. If the Railroad Company had not transported a penny's worth of freight for the Telegraph Company the latter could not have demanded payment for telegrams sent up to $75,000. The Railroad Company therefore did not pay $75,000 of transportation for the transmission of telegrams and was not required to pay that amount. It gave only the option to the Telegraph Company to take that much service.

This condition is best evidenced by the settlement between the parties in the year ending August 31, 1920. In that year the Telegraph Company sent telegrams for the Railroad Company to the total of $71,815.75, in accordance with the manner of reckoning under the contract. On the other hand, the Railroad Company carried freight for the Telegraph Company amounting to $80,721.72, and the Telegraph Company paid the Railroad Company the sum of $5,721.72. If the freight carried by the Railroad Com-

pany was the consideration for the telegrams sent by the Telegraph Company, then the Railroad Company was charged for telegrams aggregating $71,815.75, a total of $75,000. Quite apparently this is an absurdity, and yet it is the necessary conclusion of the Government's argument.

We believe that the contract itself refutes the Government's argument on this end of the controversy. If the Telegraph Company had sent $75,000 worth of telegrams for the Railroad Company and the Railroad Company had not carried a penny's worth of freight for the Telegraph Company, the Railroad Company would not have owed the Telegraph Company anything. The Telegraph Company would have had a memorandum in its accounts showing that it had carried telegrams up to $75,000, but the contract discloses that no price was to be demanded for this service, and, therefore, these memoranda did not constitute charges or evidence of charges. It is clear that in this situation the Railroad Company was not charged $75,000 for sending these telegrams. The mere fact that transportation was furnished under the privilege granted to the Telegraph Company does not make that transportation the consideration for the Telegraph Company's telegrams when it is considered that the telegrams could have been sent even though no freight had been carried. Plainly, the only thing or price demanded from the Railroad Company for the sending of these telegrams was the option granted to the Telegraph Company to call on the Railroad

Company for the transportation of its freight, and that option does not constitute a charge of $75,000 or any other amount.

The only purpose of stating an amount in the memoranda kept by both companies was to keep a record of the terms of the contract and the maximum of free service of each party. If the contract had provided that the Railroad Company might have 100,000 telegrams and the Telegraph Company might have 100,000 freight ton miles of transportation then, if we understand the Government's argument, it would be conceded that there was no charge for the telegrams, because neither the transportation nor the telegrams would be reduced to dollars. The memoranda would have stated only the number of telegrams sent and the freight ton miles of freight carried. We cannot see that it makes an iota of difference whether the memoranda of the transactions under the contract is kept in terms of dollars or in any other terms. The existence of the "charge" is a fact dependent upon statutory rights, that is, the right to demand the price.

(d) **There is no "charge" for the services when the creditor has no right to demand payment in money.** The charge which telegraph companies, as well as railroad companies, with the exception stated in Section 8563, Compiled Statutes U. S., above quoted, are compelled to make and demand under the Interstate Commerce Act is required to be made in dollars and to be settled in cash. They are not permitted to make a charge of freight or

service or anything else. Their charges must be made and collected in money and not otherwise.

In L. & N. Rwy. Co. v. Mottley, 219 U. S. 467, it was held that a carrier engaged in interstate commerce cannot lawfully charge or collect or receive anything but money for transportation on its road since the Act of June 29, 1906, prohibited any carrier from demanding, collecting or receiving "a greater or less or different compensation" for the transportation of persons or property or for any service in connection therewith than that specified in its published schedule of rates and fares and charges.

To like effect see:

C. I. & L. Ry. Co. v. U. S., 219 U. S. 486;
U. S. v. C. I. & L. Rwy. Co., 163 Fed. 114;
I. C. v. Holman, 64 So. 7;
Cowley v. Northern Pacific Rwy. Co., 123 Pac. 998.

In the above-mentioned causes it is held that agreements to accept advertising for freight, to give a pass in settlement of damages for personal injuries and to give passes to persons conveying land are all illegal.

In Section 8569 (7), Compiled Statutes U. S. 1916, it is provided:

> "Nor shall any carrier charge, demand or collect or receive a greater or less or different compensation for such transportation or passengers or property or for any service in connection therewith between the

points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

As has just been pointed out, the courts in numerous decisions have construed the word "charge," as used in the Interstate Commerce Act, to require a **payment of money**. When Congress subsequently enacted the Revenue Act of 1918 and used the word "charge" therein, it adopted as a part of said act the construction placed upon that word by the courts in construing the Interstate Commerce Act.

36 Cyc 1153 thus succinctly states the rule:

> "Where a statute that has been construed by the courts has been re-enacted in the same, or substantially the same, terms, the Legislature is presumed to have been familiar with its construction, and to have adopted it as a part of the law, unless it expressly provides for a different construction. **So where words or phrases employed in a new statute have been construed by the courts to have been used in a particular sense in a previous statute on the same subject, or one analogous to it, they are presumed, in the absence of a clearly expressed intent to the contrary, to be used in the same sense in the new statute as in the previous statute.**"

As Section 500 of the Revenue Act of 1918 and the Interstate Commerce Act relate to the same subjects, there can be no question that the rule applies in this case, and

that the word "charge" is used in subdivision (f) of section 500 in the same sense as it is used in the Interstate Commerce Act.

Section 500 (f) of the Revenue Act of 1918 provides that "in the case of each telegraph * * * message * * * for the transmission of which **the charge** is more than 14 cents and not more than 50 cents, a tax of 5 cents, and if **the charge** is more than 50 cents a tax of 10 cents." The word "the" is the definite article. The statute does not say if more than 14 cents and less than 50 cents is charged or a charge of more than 14 cents and less than 50 cents is made. Neither does it say "a charge." It says "the charge." Carriers who contract to receive less than the published rates must nevertheless collect the published rates (Texas & Pacific Rwy. Co. v. Mugg, 202 U. S. 242). Whether the Telegraph Company contracted to receive less or more than the regular rate the tax is imposed upon the regular rate because "the charge" means the charge imposed, regulated and controlled under the Interstate Commerce Act. "The charge" taxed is the charge payable only in money fixed and established under the Interstate Commerce Act. When Congress used the words "the charge" in the Revenue Acts it merely transplanted them from the Interstate Commerce Act, in which they had acquired a defined and definite meaning.

Moreover, as is pointed out above, there is no "charge" for service received under mutual options for services, and certainly there is no charge up to the amount which

the Telegraph Company has the option to receive in railway service and which it may or may not receive as it sees fit. The service which the Telegraph Company rendered becomes free of charge, because when the service was rendered it had already received the option which paid for the service. The consideration between the parties was an option for an option; it was not service for service.

(c) **Subdivision (f) of section 500 does not impose a tax where there is no right of the Telegraph Company to demand payment for the telegrams sent.** The Government concedes that the service rendered by the Railroad Company for the Telegraph Company was not paid for, and therefore it does not impose any tax against the Telegraph Company upon the freight service rendered by the Railroad Company. It justifies the tax against the Telegraph Company only because the tax upon telegrams is imposed upon the amount "charged," whereas the tax upon freight is imposed upon the amount "paid."

The use of these words does not justify any such distinction. The word "charge" appearing in the subdivision relating to telegrams was used in place of the word "paid" appearing in the other subdivision of section 500 only because of different character of the subjects taxed.

Freight, express service and similar items are very generally sent charges collect from consignee. If the consignee refuses the freight and the consignor is not solvent the carrier's only remedy is to resort to the freight car

ried, which may or may not pay the charges. Carriers frequently of necessity rely upon the freight carried to collect their charges. On the other hand, no credit is ever extended by a telegraph company or a telephone company to a telegraph message itself, or to a telephone conversation, and nothing could be collected out of these subjects. The thing carried is of no value for the purpose of collecting charges. If credit is extended, it is always extended to the sender of the message, and failure of the telegraph or telephone company to collect its charge results merely from its indiscretion in extending credit. The tax, therefore, upon telegraph and telephone messages accrues whether or not the credit extended is paid, while the tax against transportation by railroads, which, in the natural course of their business, frequently cannot collect in advance, and which by the laws are given a lien upon the freight or express carried for the collection of these charges, is imposed only upon the amount paid. This is the reason for the substitution of the word "charge" as to telegraph and telephone messages for the word "paid" which appears in the other subdivisions of section 500.

The only distinction between the incidence of the tax upon freight and the incidence of the tax upon telegrams is that one is imposed upon the amount "paid" and the other one is imposed upon the "amount charged." But neither tax arises except upon payment, as is evidenced by section 501 (a), which provides "that the taxes imposed by section 500 shall be paid by the person paying

for the service or facilities rendered," and by section 502, which provides "that each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section." The use of the word "charge" in the tax on telegrams in lieu of the word "paid" in the tax upon other transportation does not justify the distinction which the Government makes in this case; that is, it does not justify the exemption from tax of the transportation by the Railroad Company and the subjection to tax of the transportation by the Telegraph Company, because both taxes require payment.

Section 501 and section 502 leave no doubt, if section 500 is ambiguous, that payment is a prerequisite to the accrual of either tax, and if payment is lacking in either case no tax arises. Section 501 and section 502 use and require payment as condition precedent to the tax as much in the case of telegrams as in the case of the railroads. The only difference that can possibly be justified is that in one payment is made when credit is extended; that is, paid by the creditor, while in the other payment is not made until actual satisfaction is received. There is no reason whatsoever for imposing the tax in one case where no payment is to be required while in identically the same case subject to the other tax no tax is imposed.

From what has been said, it is clear that the word "charge" has a well-defined meaning common to both the Interstate Commerce Act and Section 500 (f) of the Reve-

nue Act of 1918, and that when there is a mere exchange of service there is no "charge," and as the tax is upon the charge made, it cannot be exacted in this case.

III.

All of the Telegrams Sent by the Western Union Telegraph Company for the Missouri Pacific Railroad Company Were Exempt From the Tax.

(a) **On a proper and fair construction of the statute, there is no charge on any of the service rendered by the Telegraph Company to the Railroad Company, even though the amount of the service was in excess of $75,000.** We have shown that Section 500 of the Revenue Act of 1918 and the Interstate Commerce Act are in pari materia because they relate to the same subjects. The Interstate Commerce Act regulates and controls charges for the transportation of persons and property and for the transmission of telephone, telegraph and wireless messages. It provides for the fixing of these charges and how they shall be published and collected. It is the "charge" established, regulated, controlled and paid under the provisions of the Interstate Commerce Act that is taxed by Section 500 of the Revenue Act of 1918.

The word "charge," as used in the Interstate Commerce Act, has been construed in various decisions of the federal courts to mean a payment in money. We know of no de-

cision to the contrary. Obviously, Congress knew the construction that had been given this word, and when it again used it in section 500 (f) it used it with the same meaning. If there could be any doubt about this it disappears when we consider that the tax is imposed on the very same subjects as are regulated by the Interstate Commerce Act. Congress had that act in mind, because it was taxing the charge on the very same things that were controlled by that act. And as there could be no charge without a money payment, the act provides that the tax shall be paid "by the person paying for the service." All the telegrams sent by the Telegraph Company for the Railroad Company were free from the tax because the Railroad Company never made a payment of money to the Telegraph Company, as the service which it rendered to the Telegraph Company was greater, according to the agreed measure of the respective services, than the services received by it from the Telegraph Company.

Subdivision (c) of Article 46 of Regulations 49, promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, provides:

> "(c) If a telegraph or telephone line or lines along the line of a railroad company be necessary for the use of such railroad company in the conduct of the railroad company's business as such, and if the railroad company, under contract, transports commodities necessary to maintain or operate such telegraph or telephone line or lines along the line of such railroad

company, such commodities being intended to be or having been so used, and the railroad company makes no charge for such transportation, the charges which, but for such arrangement, would have accrued on such transportation are exempt from the tax."

This regulation specifically provides that there will be no tax if "the railroad company makes no charge for such transportation." By virtue of said regulation the Telegraph Company paid no tax on the transportation furnished by the Railroad Company to the Telegraph Company under the agreement. The Government admitted there was no tax and did not exact it. We assume that if the Railroad Company had made a charge for the transportation furnished the Telegraph Company the tax would have been imposed. The wording of this regulation leaves no doubt that the tax would have been imposed against the Telegraph Company had it not been for the agreement between the two companies, and that the Government must have considered that the agreement on the part of the Telegraph Company to transmit messages for the Railroad Company in consideration of the Railroad Company furnishing transportation to the Telegraph Company for the purpose of maintaining the telegraph lines was not a charge.

This is clearly shown by the very words of the clause "that charges **which, but for such arrangement,** would have accrued on such transportation are exempt from the

tax." The important words here are "which, but for such arrangement." The arrangement is the agreement to transport commodities necessary to maintain or operate the lines, and where the Telegraph Company gives service in exchange and does not pay money there is no charge.

We admit there was no charge for the transportation service rendered by the Railroad Company for the Telegraph Company. We have said all along there is no charge within the meaning of the Revenue Acts or the Interstate Commerce Act unless money is paid for the service. But where we fail to follow the Government is in its insistence that when the two companies mutually agreed to exchange services there was a charge on the part of the Telegraph Company for the telegrams which it sent for the Railroad Company, hence a tax, but there was no charge on the part of the Railroad Company for the transportation which it furnished the Telegraph Company, hence no tax.

The Government's anomalous position is easily discernible. Of course, it is contrary to reason to contend that no charge accrued on the service rendered by the Railroad Company to the Telegraph Company because of the arrangement had between the two companies to render mutual services, but that charges did accrue on the service rendered by the Telegraph Company to the Railroad Company. If no charge accrued on the railroad transportation, no charge accrued on the telegrams.

(b) **As the tariffs, rates and charges established under**

the Commerce Act do not apply to services under an agreement for the exchange of services, the charge which is taxed under section 500 does not exist. Congress provided in the Interstate Commerce Act, Section 8563 (3), Compiled Statutes U. S. 1916, that all "charges" for the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable shall be just and reasonable, and further provided:

> "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

It will thus be seen that telegrams sent under an exchange of services were freed from "charge" entirely. They could be sent on any basis agreed upon by the parties as long as they constituted an exchange of services. If the Telegraph Company agreed to send an unlimited number of telegrams for the Railroad Company in consideration of the Railroad Company transporting all the supplies, material and men necessary to maintain the telegraph lines, there would be no charge. No charge under the tariffs, rates and charges made by telegraph companies is imposed upon such telegrams.

As the service rendered by the Telegraph Company to the Railroad Company was exempt from tariffs, rates and charges under the Interstate Commerce Act, there was no charge to tax under the Revenue Act of 1918, because we

have seen that in using the word "charge" in section 500 (f) of said act Congress adopted the word from the Interstate Commerce Act, together with the construction placed upon it by the courts in construing the Interstate Commerce Act.

If it be conceded that in a contract providing for an excess of service, where the excess service rendered by either party is to be paid for in money by the other, there is a "charge" for such excess service, and the tax is imposed upon that charge, certainly up to the point where the service rendered by one party offsets the service rendered by the other, according to the manner of reckoning provided for in the agreement, no charge exists upon which the tax claimed by the Government may be imposed. In this case it has been shown that the service rendered by the Telegraph Company never exceeded the service rendered by the Railroad Company.

(c) **The numerous other subdivisions of Section 500 of the Revenue Act of 1918 imposing a tax upon the amount "paid" are associated with subdivision (f) thereof imposing a tax upon the amount of the "charge," and this association of subdivisions requires that that meaning of the word "charge" be accepted which is closest to the word "paid."** In all the subdivisions of Section 500 of the Revenue Act of 1918, except subdivision (f), the taxes are imposed upon the amount **paid** for the transportation of freight, for the transportation of express, for the transpor-

tation of persons, for the transportation of oil by pipe line, and for the transportation of all of the other subjects which are regulated and controlled by the Interstate Commerce Act. It is the tariffs, rates and charges which are established under the Interstate Commerce Act which are taxed under all these subdivisions. The Government admits this. Such charges are only taxed when the amount of the charge is actually paid. Because of the peculiar conditions under which telegrams and telephone messages are sent, the tax upon this charge is imposed when the credit is extended. But telegraph and telephone messages are of the same character as the other items mentioned in section 500. These items all follow one another in their enumeration in that section. The presumption that they are all of the same character, that they refer to the same regulated, established and published tariffs is most persuasive, and is controlling in the absence of a contrary mandate.

It is an accepted rule of interpretation as to taxing statutes that they are to be construed in favor of the tax payer and against the Government, and the rule is well stated by the Supreme Court of the United States in the case of Gould v. Gould, 245 U. S. 153, as follows:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt

they are construed most strongly against the Government and in favor of the citizen (U. S. v. Wigglesworth, 2 Story 369, Fed. Cas. No. 16,690; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55; Benziger v. United States, 192 U. S. 38, 55, 48 L. ed. 331, 338, 24 Sup. Ct. Rep. 189)."

See, also:

U. S. v. Field, 255 U. S. 257, and
Smietanka v. First Trust & Savings Bank, 257 U. S. 602.

In U. S. v. Salen, 235 U. S. 237, the meaning of the declaration made by an importer of goods was in question. It was contended that one section of the declaration had a broader and more general meaning than all the other sections. The Court held:

"Seven of the eight clauses (of the declaration) distinctly related to documents. To say that the sixth clause in this enumeration was intended to embrace undefined extraneous matter would be to suddenly depart from the particular to the general and back again from the general to the particular—from the particular subject of documents, to which the attention of the affiant had been specially directed by the first five clauses, into a general field of wider and indefinite scope and—in the seventh clause—again to return to the particular subject of documents. Such an interpretation would give an exceedingly liberal construc-

> tion to a statute defining a felony. It would ignore the fact that the meaning of words is affected by their context and violate the settled rule that words which, standing alone, might have a wide and comprehensive import, will, when joined with those defining specific acts, be interpreted in their narrower sense and understood to refer to things of the same nature as those described in the associated list, enumeration or class."

See, also:

> Virginia v. Tennessee, 148 U. S. 503;
> United States v. Chase, 135 U. S. 255;
> Neal v. Clark, 95 U. S. 704.

In the Revenue Act of 1918 the tax is imposed upon the amount paid for transportation of passengers and property, including the transportation of oil, and for the transmission of telegraph, telephone and cable messages, and messages by wireless. Every one of these subjects is controlled and regulated by the Interstate Commerce Act and the rates, tariffs and charges to be paid for the service are established with the consent and under the rules of the Interstate Commerce Commission. To rule that the subjects of the tax in all of the other subdivisions, except subdivision (f) of Section 500 of the Revenue Act, are the tariffs, rates and charges (when paid) established under the Interstate Commerce Act, while the charges in subdivision (f) concerning telegrams and telephone messages are not the very same character of things as those taxed

in other subdivisions of said section, is to violate the judicial principles of construction to which the United States Supreme Court refers in the cases cited. To paraphrase its language and its words in United States v. Salen, supra:

> "To say that the sixth clause (of section 500) in this enumeration was intended to embrace undefined extraneous matter would be to suddenly depart from the particular (statutory controlled rates, tariffs and charges) to the general and back again from the general to the particular—from the particular subject of statutory controlled rates, tariffs and charges to which the attention of the officer has been specifically directed by the first five clauses into a general field of wide and indefinite scope and—in the seventh clause—again to return to the particular subject of statutory controlled rates, tariffs and charges."

In United States v. Weitzel, 246 U. S. 533, the statutes controlling national banks granting powers to the Comptroller of the Currency were under consideration. The Comptroller of the Currency has authority, when necessary, to appoint a receiver for any particular bank. Defendant Weitzel was appointed Receiver and later was indicted for embezzlement and making false entries, under Revised Statutes, Section 5209. That section does not mention receivers. It mentions presidents, directors, cashiers, tellers, clerks or agents. The Government contended that a receiver was an agent, within the meaning of the act. The Court held:

"The fact that in this section the words 'clerk or agent' follow 'president, cashier, director, teller' tends, under the rule of noscitur a sociis, to confirm the inference."

So in this case, if the meaning of "charge," as used in section 500 (f), is doubtful, its meaning may be ascertained by reference to the meaning of associated words, or words used in a like connection in the same act. The only words used in a similar connection in the other subdivisions of section 500 is the word "paid," and since "charge" is susceptible of two meanings, when used with respect to commercial transactions, that one of the two meanings must be accepted which more nearly agrees with the meaning of "paid," which eliminates the meaning contended for by the Government and compels the adoption of the meaning contended for by the Railroad Company, that "charge" means those statutory tariffs, rates and charges which are taxed under the subdivisions of section 500, in which the word "paid" is used.

IV.

The Telegrams Taxed Were Exempted by the Revenue Act of 1918.

When Congress passed the Revenue Act, providing for a tax upon messages **to be paid by the person paying for the services**, and excepted services rendered

> "upon transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier," etc.,

and

> "any commodity which is necessary for the use of the carrier in the conduct of its business, as such,"

it had before it the Interstate Commerce Act which had been passed in 1908 and amended in the year 1917, making telegraph companies common carriers to all intents and purposes by the use of the following language:

> "The term 'common carrier,' as used in this act, shall include * * * telegraph, telephone and cable companies operating by wire or wireless."

Subparagraph 3, Section 1, Interstate Com. Act.

And Congress also had before it the exception contained in subparagraph 5, Section 1 of the Interstate Commerce Act, as follows:

> "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services,"

and the following portion of subparagraph 7, Section 1 of the Interstate Commerce Act:

"Provided that this provision shall not be construed to prohibit the interchange of passes for the officers, agents and employes of common carriers and their families; * * * and provided, further, that this provision shall not be construed to prohibit the privilege of passes or franks or the exchange thereof with each other for the officers, agents, employes and their families of such telegraph, telephone and cable lines, and the officers, agents, employes and their families of other common carriers subject to the provisions of this act."

When the Interstate Commerce Act is read, in connection with the exceptions contained in the Revenue Act that the tax shall not apply upon the commodities or services rendered by common carriers, and the tax upon telegrams is confined wholly to payments made

"by the person paying for the services or facilities rendered,"

it should be apparent that the provision known as Article Nine of Regulations 57 of the Commissioner of Internal Revenue was wholly outside his jurisdiction, in attempting to impose a tax upon this exchange service of common carriers, which was clearly authorized by the Interstate Commerce Act and excepted from the General Revenue Act of the Government.

It is an accepted rule of interpretation as to taxing statutes that they are to be construed in favor of the tax-

payer and against the Government, and the rule is well stated by this Court in the case of

Gould v. Gould, 245 U. S. 153,

as follows:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government and in favor of the citizen (U. S. v. Wigglesworth, 2 Story 369, Fed. Cas. No. 16,690; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55; Benziger v. United States, 192 U. S. 38, 55, 48 L. ed. 331, 338, 24 Sup. Ct. Rep. 189)."

See, also:

U. S. v. Field, 255 U. S. 257, and
Smietanka v. First Trust & Savings Bank, 257 U. S. 602.

In justifying Article 9 of Regulation 57, the Internal Revenue Department must, of necessity, attempt to resolve the consideration for the free messages to a cash denominator, and thereby invoke paragraph F, section 500, which provides for the transmission of messages:

"Of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents a tax of ten (10) cents."

The position taken by the Revenue Department is thus outlined in its brief filed in the case of Western Union Telegraph Company v. D. L. & W., 282 Fed. 925, to wit:

"But it is contended that although such services are rendered for hire, the tax does not apply because it cannot be said that there was a charge of over 14 cents for each of such messages. It might be conceded there would be some force to this argument, were it not for the fact that the services in this case were rendered upon an agreed valuation of such services in dollars and cents. The charge in this case was not only computable in dollars and cents, but was in fact computed on this basis at the time the contract was executed. When the time for settlement came the only computation required was an application of the regular commercial rates to the various messages transmitted."

The regulations of the Department, as they stand, impute to Congress the unfair discrimination in favor of free transportation and against free messages. From the viewpoint of abstract justice we can see no possible justification for such discrimination, and, as Congress has not specifically provided that such messages must be taxed, we feel that it is not even discretionary with the Commissioner's Department to so interpret the act.

As said in **Rockefeller v. O'Brien, 224 Fed. 541:**

> "A taxing statute must be construed as part of the legislative taxing system of the state, and if there is any doubt as to its meaning the construction must be strict and the doubt resolved in favor of the citizen."

These provisions regarding the free allowance of telegraphic service and free transportation of men and materials were before the Supreme Court of the United States in the case of Postal Telegraph Cable Co. v. Tonopah & Tide Water R. R. Co., 248 U. S. 471, 62 L. Ed. 365. The Interstate Commerce Commission had ruled that, so far as "off the line" services were concerned, full tariff rates must be collected for all telegrams sent and all transportation furnished. The Supreme Court held this ruling to be in error, saying:

> "The contracts elaborately provide for the reciprocal rights of the companies for a division of expenses between the railroad and telegraph, for the use by the telegraph of the railroad's right of way for its poles, for monthly payment of a certain sum by the telegraph, and then agree, this being the point now material, that up to a certain amount, calculated at the regular day rates of the telegraph, it should deliver free of charge messages pertaining to the railroad business, to any points on its system on or beyond the railroad lines, and that, up to an amount calculated in similar manner, the railroad should

transport the materials, supplies and employes of the telegraph needed for the construction, maintenance or renewal of the telegraph lines, whether on or off the lines of the road. The latest ruling of the Interstate Commerce Commission is that these contracts for an exchange of services, while valid for services on the line, are invalid as to services off the line, which last, it is held, must be charged for by the railroad upon the basis of its published rates, and by the telegraph upon that of its charges reasonably charged to other customers for similar services. * * * it is said that * * * the exchange of services off the line must be on the terms that we have stated, which makes the act as to them merely a superfluous permission to settle accounts periodically instead of paying for each transaction in cash. **But 'exchange' is barter, and carries with it no implication of reduction to money as a common denominator.** It contemplates simply an estimate, determined by self-interest, of the relative value and importance of the services rendered and those received. * * *

"The passion for equality sometimes leads to hollow formulas and the attempt to bring these arrangements under the head of undue preferences and the like hardly seems a natural result of the statute. **No one knows which of the two would be found to be preferred as having the best of a very complex bargain. All the great benefits derived on one side are the consideration for all those conferred upon the other.**"

We submit that the Commission, in the ruling disapproved of by the Supreme Court of the United States in

The contract between the Telegraph Company and the Missouri Pacific was made in the year 1911, long before the enactment of the Revenue Act of 1918. It was a contract made in good faith by the parties, and with no purpose of evading any obligation to the state or Government. It was a contract the parties had a right to make. The provisions of the Revenue Act passed in 1918 should not, therefore, be extended, by construction, so as to impose a tax upon telegraphic messages transmitted under the provisions of this contract, unless such messages are clearly covered by the law itself.

The true rule of construction in such cases is the one announced by the Court in the case of

In re Temtor Corn & Fruit Products Co., 299 Fed. Rep. No. 1, Aug. 28, 1924, p. 326.

The statute involved in that case provided that a consolidated return should be made when one corporation was affiliated with another," and the Commissioner of Internal Revenue had construed that language to mean ninety five per cent (95%) of the stock.

The Court, in passing upon the facts, said:

> "The statute also provides that the Commissioner of Internal Revenue shall require consolidated returns from affiliated corporations under regulations which he is empowered to prescribe. But the question of the fact of affiliation is left, by the very defini-

tion of what constitutes affiliation, even in the statute itself a matter of judicial construction, and not a matter of administrative or departmental regulation; for the language of the section is:

> "'That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner, * * * make a consolidated return.'

"Further on in this section there is a statutory definition of what constitutes affiliation. So it is too obvious for argument that it is not left to the Commissioner to prescribe what constitutes affiliation, for the statute fixes that, but what is left to be prescribed by the Commissioner's regulation is the manner of the making of the return. In short, the law itself says **who** shall make a consolidated return. The Commissioner may only say **how** such return shall be made.

"The Commissioner, then, had no power to say, as he has said by his regulation, that 'substantially all of the stock of the other' means '95 per cent of the voting stock.' It is a matter for the courts to construe, and not a matter about which the Commissioner may promulgate a regulation binding upon the courts."

In the case of

Merritt v. Cameron, 137 U. S. 551,

the Court held that

> "A regulation of a department, however, cannot repeal a statute; neither is a construction of a statute

by a department, charged with its execution, to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time."

This is particularly true as to an interpretation of a revenue act for the reason that all revenue acts are construed strictly against the Government and in favor of the citizen.

Gould v. Gould, 245 U. S. 153.

In

Niles, Collector, v. Mutual Insurance Co.,
252 Fed. 564,

the suit was to recover taxes paid under protest, where the plaintiff, as a mutual insurance company, had collected cash premiums in advance, which were sufficient to cover unearned premium reserves and a surplus in excess of the reserve, which was put out at interest. The Commissioner of Internal Revenue, under his regulations, held that these cash premiums were subject to the tax and did not come within the exemption of co-operative companies, but the Court of Appeals of the Sixth Circuit held that the earnings of the company on this surplus were merely incidental and that

"the object of the business in each class is not to undertake investments on behalf of the members, but solely to protect more effectively the members' property. * * * A mere incidental profit earned by way of interest on its invested safety funds, or on its bank balance, does not change the purely mutual character of the company, or indicate that its business, though thus earning a profit, is 'carried on for profit.'"

This reasoning applies to the exchange service rendered by the Telegraph Company and the Railroad Company in this case, for there was not only no profit made thereon, but no payment at all made therefor; both companies were authorized by the Interstate Commerce Act to exchange such service, and the Revenue Act excepted such service, so necessary in the business of the common carrier, from the federal tax.

The mutual exchange of services by the Telegraph Company and the Railroad Company, under the authority of the Act to Regulate Commerce, fell clearly within the exception of the revenue law, and Regulation No. 57, Article IX, of the Commissioner of Internal Revenue was beyond and outside the scope of his authority.

The agreed statement of facts admits that the amount sued for is the amount which the Railroad Company is entitled to recover, in the event the finding should be in its favor, and we submit that the judgment of the District Court should be reversed and that of the United States Circuit Court of Appeals affirmed.

Respectfully submitted,

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EDW. J. WHITE,
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Railroad Company.